No. 86-619

In the Supreme Court of the United States

OCTOBER TERM, 1986

MARIE A. ALLEN,

Petitioner

v.

CHILTON CO., DIVISION OF A.B.C., INC.,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals correctly held that the district court had not abused its discretion in dismissing Petitioner's complaint for failure to obey orders of the district court regarding discovery when (1) Petitioner and her counsel ignored two orders of the district court requiring Petitioner to appear for a deposition; (2) Petitioner and her counsel failed to appear for Petitioner's deposition on April 8, 1985, despite the district court's express warning that failure to attend the deposition and answer proper questions would subject Petitioner to the sanction of dismissal; (3) Petitioner's counsel did not respond, or filed untimely responses, to several motions; (4) the district court had unsuccessfully imposed alternative, less drastic sanctions; and (5) despite the district court's second order requiring her to attend a deposition, Petitioner failed to attend her deposition on June 10, 1985.

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DESIGNATION OF CORPORATE RELATIONSHIPS

Pursuant to Rule 28.1 of the Rules of the Court, Respondent submits the following statement. The following companies are the parents, non-wholly owned subsidiaries and non-wholly owned affiliates of Respondent Chilton Co.: Capital Cities/ABC, Inc.; ABC Holding Company, inc.; Chilton Holding Company, Inc.; Worldwide Television News Corporation; and ESPN, Inc.

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COUNTER-STATEMENT OF THE CASE

Petitioner, a former employee of Respondent, Chilton Co. ("Chilton"), filed a complaint against Chilton in the United States District Court for the Eastern District of Pennsylvania on October 9, 1984, alleging violations of the Equal Pay Act, 29 U.S.C. §206(d), Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e to 2000e-17, and the Pennsylvania Human Relations Act (PHRA), Pa. Stat. Ann. tit. 43 §§951-963 (Purdon 1964 & Supp. 1984), and seeking declaratory, injunctive and monetary relief. Petitioner was represented at all times in the proceedings below by experienced trial counsel, Beverly K. Thompson, Esquire, a Philadelphia attorney. In addition, on October 12, 1984, three days after the complaint was filed,

another experienced trial lawyer, Joel H. Slomsky, Esquire, entered an appearance as co-counsel for Petitioner. Mr. Slomsky withdrew from the case on April 2, 1985.

I. PROCEEDINGS IN THE DISTRICT COURT.

A. Respondent's Initial Effort To Take Petitioner's Deposition.

On November 20, 1984, Chilton served a notice to take Petitioner's deposition on December 7, 1984. Petitioner's counsel, Beverly K. Thompson, Esquire, informed Chilton's counsel that she, Ms. Thompson, was ill and requested a postponement of the deposition. By agreement among counsel, the deposition was postponed for approximately seven weeks and was rescheduled for January 24, 1985. On that date Petitioner's deposition was again postponed by agreement of counsel at the request of Ms. Thompson, who represented that a personal matter unrelated to her health required a second postponement. (11sa-13sa; 32sa-35sa).[1]

Over two months having elapsed since Chilton's filing of its first notice of Petitioner's deposition, Chilton's counsel notified Ms. Thompson of the rescheduling of her client's deposition for February 6, 1985. Chilton's trial counsel, corporate counsel, and a stenographer appeared on February 6 for the purpose of taking Petitioner's deposition. Neither Petitioner nor her attorney appeared. (35sa).

B. Chilton's First Motion For Sanctions And The District Court's First Sanction Order.

On March 15, 1985, Chilton filed a motion seeking sanc-

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1. References to the Petition for A Writ of Certiorari are abbreviated 'Pet.' Page references to the Appendices to Petition for A Writ of Certiorari are given in the form 'A-___', 'B-___', 'C-___' with the page number following. Page references to the Appendix in the Court of Appeals are given in the form '___a' with the page number preceding. Page references to the Supplemental Appendix in the Court of Appeals are given in the form '___sa' with the page number preceding. Emphasis is supplied throughout unless otherwise noted.

tions for Petitioner's failure to attend her February 6 deposition. Petitioner filed no response to the motion.

On March 27, 1985, the district court entered an order (a) assessing $300 in costs personally on Ms. Thompson, as counsel for Petitioner, (b) ordering Petitioner to appear for a deposition upon five days written notice, and (c) permitting Petitioner to retain other counsel should her attorney of record be unable to appear. The district court's order specifically stated that Petitioner's continued failure to appear for her deposition could result in dismissal of the action (26a):

> Plaintiff's failure to attend the deposition and answer proper questions will subject her to the sanction of dismissal of this action.

Pursuant to the district court's March 27, 1985, order, Respondent served a notice of deposition on Petitioner's counsel, rescheduling the deposition for April 8, 1985.

Once again, neither Petitioner nor her attorney appeared for the deposition. (55sa).

C. Chilton's Second Motion For Sanctions.

On April 17, 1985, Respondent filed a second motion for sanctions seeking dismissal of Petitioner's complaint for her failure to obey the district court's March 27 order. (42sa). Petitioner filed an untimely response to the motion for sanctions, in the form of a motion to place the matter on inactive status, which referred to Petitioner's counsel's health problems and to Petitioner's efforts to obtain new representation. (30a).

D. The District Court's Second Sanction Order And Opinion.

The district court entered a Memorandum and Order on May 13, 1985, disposing of Chilton's second motion for sanctions. The May 13 order, which the district court directed to be sent to Petitioner personally as well as to her counsel, directed Petitioner to obtain new counsel by May 31, 1985,

and again permitted Chilton to schedule a deposition after June 10, 1985, upon five days written notice. The court directed Petitioner to appear for the deposition whether or not she had retained new representation by that date. (63sa-67sa). The court's order provided:

> It is ordered that plaintiff shall have until and including May 31, 1985, to obtain, if she so desires, other counsel to represent her in this matter. Whether plaintiff obtains other counsel to represent her, the defendant may take the oral deposition of Marie A. Allen upon five days' written notice by mail provided to her personally, and to any counsel who is then attorney of record for her by reason of having filed of record a pleading on her behalf or an appearance for her and which has not been duly withdrawn. Notice shall be deemed effective for the purpose of calculating the five days' notice upon the mailing of such notice. Said oral deposition may be scheduled for any working day commencing on or after June 10, 1985. In all other respects the order of March 27, 1985, shall remain in full force and effect.
>
> It is further ordered that a copy of this order shall be mailed to Marie A. Allen at her address of record, as well as to her attorney.

Petitioner's counsel responded by filing an untimely motion for reconsideration on May 24, 1985, and, when Chilton scheduled the deposition for June 10, 1985, instructed her client not to appear. (Pet. at 15). Although Chilton's counsel notified Petitioner's counsel on June 6, 1985, that the district court's order was not affected by the untimely motion for reconsideration, Petitioner nonetheless did not appear for the rescheduled deposition on June 10. (99sa).

E. Chilton's Third Motion For Sanctions And The District Court's Opinion And Order Of Dismissal.

Eight months after the filing of the Complaint, and after

scheduling Petitioner's deposition five times, Chilton had still been unable to take Petitioner's deposition. Respondent filed a *third* motion for sanctions on June 17, 1985. Petitioner's counsel filed an untimely response to the third motion for sanctions in which she stated that she would "rely on her motion for leave to place the matter on inactive status and motion for reconsideration."

On August 1, 1985, the district court ordered dismissal pursuant to Fed.R.Civ.P. 37(b)(2)(C) and filed an opinion supporting the propriety of dismissal in these aggravated circumstances. (C1-C14).

In exercising its discretion to dismiss Petitioner's complaint for repeated violation of its orders, the district court expressly recognized the "ultimate" and "extreme" nature of the sanction of dismissal. The court reviewed the record and carefully balanced the factors set forth by the Court of Appeals for the Third Circuit in *Poulis v. State Farm Fire and Casualty Co.*, 747 F.2d 863 (3d Cir. 1984), for determining whether dismissal of an action is a proper exercise of the court's discretion.

The district court found that, as a result of her personal receipt of the court's May 13, 1985, order, "the plaintiff is personally responsible for her failure to appear at the June 10, 1985, deposition because she had notice provided to her directly." (C-9). The court also determined that, because Chilton "had been stymied in its attempt to obtain what is perhaps the most basic and essential defense discovery; namely, plaintiff's deposition," Chilton has suffered prejudice. (C-10). The court found that Petitioner's counsel's repeated failure to respond to motions, her inadequate and untimely responses, and the fact that, between October 12, 1984, and April 1, 1985, Petitioner had co-counsel who could have appeared with Petitioner at a deposition, "reveals a history of dilatoriness by plaintiff's counsel." (C-10). The willfulness of Petitioner's counsel's conduct was found in her May 28, 1985, motion to reconsider the court's May 13 order, in which Petitioner argued that the sanction of dismissal—which was not then at issue—would be inappropriate. The court found that it was clear "from

reading plaintiff's motion for reconsideration that counsel fully intended to fail to comply with the Court's May 13, 1985, Order." (C-11). Finally, the court determined that, in light of its earlier imposition of costs directly to Petitioner's counsel, "monetary sanctions would be a toothless remedy in this case and that dismissal, although a last resort, is entirely justified." (C-12).

In concluding that the only effective sanction was dismissal of the action, the court stated (C-13):

> . . . this case demonstrates a conscious and continuing effort on the part of plaintiff and her counsel to prevent defendant from obtaining discovery to which it is entitled under federal rules of procedure.

II. PROCEEDINGS IN THE COURT OF APPEALS.

A panel of the United States Court of Appeals for the Third Circuit, consisting of the Honorable Arlin M. Adams, the Honorable Joseph F. Weis, Jr. and the Honorable A. Leon Higginbotham, Jr., heard oral argument on Petitioner's appeal on June 4, 1986. On June 11, 1986, the court unanimously affirmed the district court's dismissal of the complaint and filed an opinion. (B-1). After independently reexamining the record and conducting its own analysis of the *Poulis* factors, the Court of Appeals held (B-7):

> All of the district court's conclusions—concerning plaintiff's knowledge and participation, the prejudice to defendant, the history of dilatoriness, the willful violation of a court order, and the ineffectiveness of milder sanctions—are supported by the record, and taken together, they support the district court's decision.

Petitioner filed a petition for rehearing in banc, which the Court of Appeals denied on July 14, 1986.

REASONS FOR DENYING THE PETITION

Petitioner seeks review of the decision of the United States Court of Appeals for the Third Circuit solely because, according to Petitioner, the Court of Appeals "misapplied its own guidelines for the imposition of the sanction of dismissal." (Pet. at 14). Petitioner does not allege that the Third Circuit's decision conflicts with any decision of this Court or with the decisions of any other circuit. The Petition does not ask this Court to reconsider its controlling decision in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976), in which the Court defined the scope of the district courts' discretion to dismiss cases for violation of pretrial discovery and scheduling orders. The Petition does not so much as allege that Third Circuit precedents or its decision in this case conflict with *National Hockey League*. Nor does Petitioner suggest that any aspect of the holding in *National Hockey League* requires clarification by this Court or that the Third Circuit "guidelines" for imposing the sanction of dismissal are confused. In short, Petitioner presents no reason why the Petition should be granted.

Petitioner merely challenges the lower courts' isolated application to the record facts in this case of settled legal principles regarding discretionary dismissal for repeated violation of trial court discovery orders. A writ of certiorari should not issue solely for this Court to review this record for yet a third time. As the Court often has said, the writ of certiorari is not granted "merely to review the evidence or inferences drawn from it." *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 164, 165 (1924) ("the argument developed that the controverted question was whether the evidence sufficed ... primarily a question of fact"; writ dismissed as improvidently granted). As Mr. Justice Holmes said in *United States v. Johnston*, 268 U.S. 220, 227 (1925), "We do not grant a certiorari to review evidence and discuss specific facts."

Petitioner's request that this Court reexamine the record

previously reviewed by both the district court and Court of Appeals is inappropriate. Consequently, the Petition should be denied.

I. THE PETITION SHOULD BE DENIED BECAUSE THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THE CONTROLLING DECISION OF THIS COURT AND DOES NOT CONFLICT WITH ANY DECISION OF THE THIRD CIRCUIT OR ANY OTHER CIRCUIT.

Petitioner's attempt to transform the simple question in this case into a Fifth Amendment issue, entitling her to flout the rules of civil procedure in the name of the right to assistance of counsel, is a transparent effort. The district court and Court of Appeals accurately and fairly applied well-established principles of law to the facts in this case. Those principles were established by this Court in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976), where the Court recognized that:

> . . . the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. If the decision of the court of appeals remained undisturbed in this case, it might well be that *these* respondents would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts.

In *National Hockey League*, the district judge[2] dismissed

2. Coincidentally, Judge Higginbotham, a member of the Third Circuit panel which affirmed the district court's dismissal of Petitioner's complaint in this case, was also the district court judge whose decision dismissing the complaint this Court summarily affirmed in *National Hockey League*. See 63 F.R.D. 641 (E.D. Pa. 1974).

an antitrust action for plaintiffs' failure to comply with the court's discovery orders. The district court found that, over a seventeen-month period, plaintiffs had failed to provide answers to interrogatories on a timely basis, had filed untimely motions for extensions of time, and served answers which "fell drastically short of any minimal good faith compliance [with the rules of civil procedure]." 63 F.R.D. 641, 645. As in this case, during the course of those proceedings, the district court had specifically warned plaintiffs that they might suffer dismissal of their action if they failed to answer interrogatories or comply with orders of the court.

In April 1974, the district court ordered plaintiffs to answer defendants' supplemental interrogatories which related to damages allegedly sustained by plaintiffs, characterizing these damage interrogatories as "the core of the defendants' defense" and ordered that the interrogatories be answered by June 14, 1974. The court stated:

> . . . plaintiffs will be directed to supplement these answers whenever the data become available and in no event later than June 14, 1974. In this regard the plaintiffs are forewarned that the court will be amenable to entertaining any motions under Fed.R.Civ.P. 37 should such information not be forthcoming by June 14, 1974.

Despite the district court's clear warning, plaintiffs failed to file interrogatory answers on June 14. Instead, on June 19, 1974, plaintiffs filed a motion requesting an extension of time in which to answer the damage interrogatories. Defendants moved to dismiss the complaint.

Recognizing the "harshness of the sanction of dismissal" and appreciating that it should not be "lightly or cavalierly invoke[d]," the court nevertheless held that dismissal was warranted. The court held:

> After seventeen months where crucial interrogatories remained substantially unanswered despite numerous extensions granted at the eleventh hour and, in many instances, beyond the eleventh hour, and notwithstanding several admonitions by the Court and promises and com-

> mitments by the plaintiffs, the Court must and does conclude that the conduct of the plaintiffs demonstrates the callous disregard of responsibilities counsel owe to the Court and to their opponents. The practices of the plaintiffs exemplify flagrant bad faith when after being expressly directed to perform an act by a date certain, viz., June 14, 1974, they failed to perform and compounded that noncompliance by waiting until five days afterwards before they filed any motions. Moreover, this action was taken in the face of warnings that their failure to provide certain information could result in the imposition of sanctions under Fed.R.Civ.P. 37.

The Third Circuit reversed, holding that the district court had abused its discretion in dismissing the case. 531 F.2d 1188. (3d Cir. 1976).

This Court granted certiorari and, on the certiorari papers, summarily reversed, holding that the district judge "did not abuse his discretion in finding bad faith on the part of these respondents, and concluding that the extreme sanction of dismissal was appropriate in this case by reason of respondents' 'flagrant bad faith' and their counsel's 'callous disregard' of their responsibilities." 427 U.S. 639, 643.

Since *National Hockey League,* this Court has reaffirmed the "bad faith" and "callous disregard" standard for imposition of the sanction of dismissal. The Court continues to recognize that a trial judge must have discretion to impose the ultimate sanction of dismissal on disobedient parties, both as a penalty to those whose conduct warrants such a sanction and as a deterrent to those who might engage in such conduct in the absence of the deterrent. *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 763-764 (1980).

Petitioner has not suggested that the *National Hockey League* standard is incorrect or requires reexamination or clarification. Nor does Petitioner contend that Third Circuit precedent conflicts with *National Hockey League.* On the contrary, the Court of Appeals for the Third Circuit has correctly applied the holding of *National Hockey League.*

In *Poulis v. State Farm Fire and Casualty Company,* 747 F.2d 863 (3d Cir. 1984), the Third Circuit, emphasizing that *National Hockey League* permitted the "drastic" sanction of dismissal only in "extreme" situations, stated that it would determine whether a district court had abused its discretion by analyzing and balancing six factors. In order to "assure that the 'extreme' sanction of dismissal or default is reserved for the instances in which it is justly merited," 747 F.2d 863, 870, the Court of Appeals laid down the following factors controlling discretionary dismissal for violation of pretrial discovery orders:

(1) the extent of the *party's* personal *responsibility;*
(2) the *prejudice* to the adversary caused by the failure to meet scheduling orders and respond to discovery;
(3) a *history* of dilatoriness;
(4) whether the conduct of the party or the attorney was *willful* or in *bad faith;*
(5) the effectiveness of sanctions other than dismissal, which entails an analysis of *alternative sanctions;* and
(6) the *meritoriousness* of the claim or defense.

747 F.2d 863, 868 (emphasis in original). In implementing *National Hockey League,* the Third Circuit has established a clear and definite standard for district courts to use in evaluating whether the facts of a particular case justify dismissal.

Petitioner does not contend that the Third Circuit's *Poulis* standard departs from the teaching of *National Hockey League,* or is incorrect or prejudicial. Petitioner likewise does not contend that the *Poulis* factors or the Third Circuit decision in this case conflict with decisions in any other circuit. The Petition should therefore be denied.

II. PETITIONER'S CONDUCT IN DISOBEYING DISCOVERY ORDERS WARRANTED DISMISSAL AND THE DECISIONS OF THE LOWER COURTS IN THIS CASE ARE CORRECT.

The district court judge and a unanimous panel of the

Third Circuit found that Petitioner's repeated, flagrant violations of pretrial discovery orders justified the ultimate sanction of dismissal in this case. These determinations were correct.[3]

Petitioner's contemptuous flouting of the district court's discovery orders warranted dismissal in the aggravated circumstances of this case. Petitioner and her counsel steadfastly refused to appear for Petitioner's deposition. Petitioner continued her refusal to appear for her deposition even after imposition of the less drastic sanction of an award of costs. Petitioner continued her refusal to appear for her deposition after the district court had issued an express warning that continued refusal to appear would result in dismissal. Petitioner's refusal to appear continued despite *personal notice* to Petitioner as well as to Petitioner's counsel of the district court's direction. This flagrantly contemptuous pattern of dilatory conduct by Petitioner and her counsel successfully prevented Respondent for more than *eight months* after the filing of the complaint from obtaining the plaintiff's deposition to ascertain the claimed basis for this lawsuit.

The Court correctly found that plaintiff's disregard of a clear court order to attend a deposition in June 1985 demonstrated that Petitioner "herself was at least partly responsible for the delays" in the case. (B-5). The Court of Appeals also correctly determined that Respondent had demonstrated the prejudice required by *Poulis* and *Scarborough v. Eubanks*, 747 F.2d 871 (3d Cir. 1984), by establishing that it had sought to undertake the most basic form of discovery for eight months and had been unable to do so because of Petitioner's conduct. (B-6). The Court's conclusion that the "history of dilatoriness

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3. Petitioner had ample opportunity to attempt to justify her flagrant disobedience of the trial court's discovery orders. Petitioner's counsel submitted numerous briefs to the district court asserting that Rule 37 sanctions were inappropriate under the circumstances of the case. The Court of Appeals heard oral argument and carefully reviewed the briefs, the record and the findings of the district court. The Court of Appeals simply applied well-established legal standards to the facts in this case and affirmed the district court's discretionary dismissal of the complaint.

is manifest" (B-6) is also supported by the record, which included references not only to repeated refusals to appear at Petitioner's deposition but also to the fact that Petitioner's counsel did not respond at all, or filed only untimely responses, to several other motions and that she failed to comply with two court orders. The Third Circuit correctly determined that Petitioner's counsel's instruction to her client not to attend a deposition in June 1985, in the teeth of the district court's order that such a deposition take place, was conclusive evidence of willful and bad faith conduct. (B-6).

The district court's response to Petitioner's flagrant disregard was a model of judicial restraint under these aggravated circumstances. The record before the Court of Appeals showed that the less drastic sanctions to which the district court had resorted were useless. Petitioner continued to flout the district court's orders even after the district court imposed costs directly on counsel. The normal alternative to dismissal proved ineffective. (B-7). Finally, the Court of Appeals recognized that while Petitioner's underlying claim may have been meritorious under the standard set forth in *Poulis*, the "presence of a meritorious claim alone could not condone the willful disregard of discovery obligations." (B-7).

Each of the findings of the Court of Appeals and the district court is supported by record evidence. Imposition of the sanction of dismissal was proper. Reexamination of these findings by this Court would serve no useful purpose.

CONCLUSION

The Petition is nothing but an improper attempt to obtain another review of the unanimous determinations of the lower courts in a case of repeated, flagrant, willful violation of a trial court's discovery orders allowing Respondent to take Petitioner's deposition. In affirming the district court's order of dismissal, the Court of Appeals applied settled principles of law to unique procedural events in this case. No controversial principle of general importance is involved. There is no conflict among the circuits. The courts below gave effect to and correctly applied prior controlling decisions of this Court.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: November 13, 1986